

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Petition of

Lincoln County, Oregon, and the
Economic Development Alliance of
Lincoln County, a non-profit corporation,
for Declaratory Ruling and Preemption
Pursuant to Section 253 of the
Communications Act of 1934
of Certain Provisions of the Oregon
Telecommunications Utility Law

CC Docket No. 97-241

COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. ("SBC"), on behalf of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell, submit these Comments in response to the Commission's Public Notice, DA 97-2577, released December 9, 1997, pertaining to the petition for declaratory ruling and preemption ("Joint Petition") filed by Lincoln County, Oregon, and the Economic Development Alliance of Lincoln County ("Petitioners").

The Oregon Public Utility Commission ("OPUC") has decided that the provision of what has been described as "dark fiber" constitutes a "telecommunications service" under applicable Oregon law,¹ which thus apparently eliminates the Central Lincoln People's Utility District ("PUD") as a potential supplier. The only way that the Petitioners ultimately achieve their goal -- using the PUD as a "dark fiber" supplier -- is to have definition of "telecommunications service" changed in the State of Oregon, or for the Commission to insert itself into relationship between a State and its political subdivisions. For apparent reasons, the Commission should deny the Joint

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Petition.

The Commission is without authority under Section 253 or otherwise to change the definition of a “telecommunications service” in the State of Oregon. Absent Oregon legislation or Oregon appellate review of the OPUC decision that results in a different interpretation, the OPUC is presumably the Oregon agency that has been authorized to implement the statutory definition of “telecommunications service” and it has done so. There is absolutely nothing in Section 253 that expressly or impliedly authorizes the FCC to substitute its judgment for that of the Oregon legislative, the OPUC, or the Oregon courts on the intrastate definition and meaning of “telecommunications services.” Section 253 simply does not authorize the FCC to rewrite Oregon law such that the intrastate definition of “telecommunications service” specifically excludes “dark fiber.” Indeed, the Communications Act of 1934, as amended, makes clear that such intrastate matters are beyond the Commission’s reach.

The fact that, as a consequence of that Oregon definition, the PUD may not be authorized to provide “telecommunications services” is also not a matter for preemption under Section 253. The Commission has already decided that issue in *Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13. There, the Commission was asked to preempt the Texas law that prohibited certain Texas

¹ SBC takes no position on the merits of that interpretation.

political subdivisions from offering specific telecommunications services. The Commission correctly interpreted Section 253 as not permitting it to preempt that state law. Memorandum Opinion and Order, FCC 97-346, para. 179 (October 1, 1997). Although the Commission declined to rule on whether it could preempt in the case of a municipally-owned electric utility such as the PUD (id.), there is no basis for a different result. Section 253 does not authorize or permit the Commission to insert itself into the relationship between a State and its political subdivisions, whether directly or indirectly (*e.g.*, into the relationship between a State and the divisions of its political subdivisions).

The Joint Petition must be denied. Petitioners cannot avoid the effect of the Memorandum Opinion and Order -- here, that the Commission is without authority to preempt the limitation on the PUD's authority -- by attacking the limiting factor -- the Oregon definition of "telecommunications services."

Respectfully submitted,


SBC Communications Inc.

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CERTIFICATE OF SERVICE

I, Robin R. Ostresh, hereby certify that the foregoing, "COMMENTS OF SBC COMMUNICATIONS INC." in CC Docket No. 97-241 has been filed this 8th day of January, 1998 to the parties on the attached service list.

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January 8, 1998